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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW ALEXIS BASLER et al., Defendants and Appellants.	D068047 (Super. Ct. No. SWF027442)

APPEALS from judgments of the Superior Court of Riverside County, Angel M. Bermudez, Judge. Affirmed in part and reversed in part.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant Matthew Alexis Basler.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant Marvin Justin Black.

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant James Wing Fung.

Kamala D. Harris, Attorney General, Gerald A. Engler, Julie L. Garland, Assistant Attorneys General, Lynne G. McGinnis, Eric A. Swenson, Deputy Attorneys General, Plaintiff and Respondent.

A jury convicted Matthew Alexis Basler, James Wing Fung, and Marvin Justin Black of first degree murder (Pen. Code,[1] §§ 187, subd. (a), 189) and premeditated attempted murder (§§ 187, subd. (a), 664). The jury also convicted Basler, Fung, and Black of assault (§ 240) as a lesser included offense of assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)). The court found that Basler had suffered a prior serious and violent felony conviction under section 667, subdivision (d), and sentenced him to an indeterminate term of 64 years to life imprisonment and a determinate term of five years. The court found that Fung had suffered three prison priors under section 667.5, subdivision (b), and a prior serious felony conviction under section 667, subdivision (d). The court sentenced Fung to an indeterminate term of 64 years to life imprisonment and a determinate term of seven years. The court further found that Black had suffered one prison prior under section 667.5, subdivision (b), and a prior serious felony conviction under section 667, subdivision (d). The court sentenced Black to an indeterminate term of 64 years to life imprisonment and a determinate term of six years.

Basler, Fung, and Black appeal. They raise a number of challenges to the judgments. Basler and Black contend the evidence does not support their convictions for

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1 Further statutory references are to the Penal Code unless otherwise stated.

first degree murder or premeditated attempted murder. Fung similarly contends the evidence does not support his conviction for premeditated attempted murder. Basler, Fung, and Black contend the court erred under *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*) by instructing the jury on the natural and probable consequences theory of aiding and abetting first degree murder; Black contends that *Chiu* should be extended to the same theory of premeditated attempted murder. Basler, Fung, and Black further contend the court erred in instructing the jury on the natural and probable consequences theory of aiding and abetting premeditated attempted murder by not requiring the jury to find that *premeditated* attempted murder was a natural and probable consequence of the target offense. Black and Fung contend their convictions should be reversed based on prosecutorial misconduct during Fung's cross-examination and the prosecutor's closing argument. Black additionally contends (1) the court erred by instructing the jury with CALCRIM No. 400 because it does not advise the jury that an aider and abettor may be convicted of a lesser offense than the perpetrator; (2) the court erred by not instructing the jury on the lesser included offense of involuntary manslaughter; (3) the court erred by excluding evidence of Basler and Fung's desire to kill Black; and (4) the court erred by not striking Black's prior serious felony conviction under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*). Defendants also assert a global joinder in each others' arguments.

The Attorney General concedes, and we agree, that the court erred under *Chiu* by instructing the jury on the natural and probable consequences theory of aiding and abetting first degree murder. The Attorney General further concedes, and we agree, that

the error was prejudicial as to Black. We conclude the error was prejudicial as to Basler and Fung as well. As we will explain, however, none of defendants' other contentions has merit.

Defendants' first degree murder convictions are reversed. As in *Chiu*, the prosecution has the option of accepting a reduction of these convictions to second degree murder or retrying the defendants on charges of first degree murder. Defendants' remaining convictions are affirmed.

FACTS

For purposes of this section, we state the evidence in the light most favorable to the judgments. (See *People v. Osband* (1996) 13 Cal.4th 622, 690; *People v. Dawkins* (2014) 230 Cal.App.4th 991, 994.) Additional facts will be discussed where relevant in the following section.

Black lived in Temecula, California with his girlfriend Lauren "Casey" Grove. Black's friend Fung was visiting from San Diego. On December 26, 2008, Fung's roommate Basler (whom Black and Grove did not know) drove from San Diego to Temecula to pick Fung up. That evening, Basler, Fung, Black, and Grove gathered at Grove's condominium and decided to go out. Grove's friend Casey Rapp joined them. While the group was at Grove's condominium, Fung passed around a folding knife that Basler had given him as a Christmas present. The blade had a distinctive hook at the end. Basler and Rapp carried knives as well, and they showed their knives to the group. Basler's knife was similar in size to Fung's knife, with a three to four-inch handle and a

blade the same size. Black was present during the discussion about knives, but he went to the bathroom a few times to style his hair into a large mohawk.

The group went to a bar. Rapp drove with Grove in Rapp's car; Basler drove with the others in his truck. The bar was crowded. Basler and Fung went to a pool table and began to play while the others watched. While Basler and Fung were playing pool, a woman placed a cup of beer on the pool table. She may have placed her cup there once before. Basler became angry and aggressive. He told the woman, "Get that drink off the table you stupid bitch." Black took the cup and tried to hand it back to the woman. She refused, and Black placed the cup in the woman's purse.

The woman, who was heavily intoxicated, became upset and buried her face in her boyfriend's chest. Her boyfriend, Christopher Martin, was at the bar celebrating his birthday, and he had a large group of friends with him. Rapp told Martin, "You need to teach your chick some bar rules." Martin confronted the group and asked them to show his girlfriend some respect. One of Martin's friends, Ryan Armstrong, joined the confrontation. Armstrong told Rapp's group they were being rude. Basler and Black reacted aggressively, with Black and Fung challenging Armstrong to a fight. Armstrong responded in kind. The groups eventually separated.

Tensions remained high between the groups throughout the night, however. Periodically the groups would exchange taunts and challenges. Basler told his group he wanted to fight. An off-duty firefighter, Rob Hagar, overheard Basler telling Fung and Black that they should pretend to apologize to Armstrong and then "jump" him. One of them said, "Yeah," and Fung nodded in agreement.

At various points, Armstrong and Martin attempted to smooth things over between the groups. Fung and Black appeared receptive. During one interaction, the groups took photos together, and Fung jokingly pretended to kiss Armstrong on the cheek. Soon afterwards, however, Basler appeared behind Armstrong, put his arm around Armstrong's neck and chest, and dragged Armstrong out the back door of the bar. Basler and Armstrong fell to the ground outside, and bystanders (including a bouncer) separated them. Basler walked away, toward the parking lot in the front of the bar. Armstrong, who was angry and upset, tried to reenter the bar through the back entrance but was refused. He walked behind the bar with three or four friends and attempted to calm down.

After this altercation, the remainder of Basler's group left through the front door of the bar. They met up with Basler, who was in his truck in the parking lot with the engine running. Rapp got into her car alone and drove home. The rest of the group got into Basler's truck. Basler drove the truck out of the parking lot, but then he turned back into the alley behind the bar, saying "Fuck that, fuck him, screw him."

Basler was upset and agitated. He told the group, "Fucking kid needs to stop running his mouth," and "Fuck him. Fuck him. Little kid needs to stop running his mouth." Fung asked, "What are you doing?" and then asked "Do you see him?" several times. Fung was laughing. Grove recalled hoping that Armstrong would not still be behind the bar.

Basler drove quickly down the alley. He passed the back entrance to the bar and stopped. Someone, likely Black, rolled down his window, looked out, and smirked. The

truck sped away. Some of Armstrong's friends, who were at the back entrance, had a bad feeling and ran after the truck.

Armstrong, Martin, and their friend Joel Ross were walking down the alley. Basler's truck drove by them quickly and turned around. Basler and Fung jumped out of the truck immediately; Black followed a few seconds later. Basler and Fung ran to Armstrong and attacked him. Black ran towards Armstrong as well. Armstrong fell to the ground.

Ross saw someone (he thought Basler) standing over Armstrong punching him. Ross jumped on the person's back but was pulled off. Ross felt a punch to his side, fell to the ground, and noticed blood beginning to fill the inside of his jacket. Black punched or kicked Ross in the head while Ross was on the ground. Grove saw Fung fighting a few individuals; at one point, they had him in a headlock. She saw Black pull one of the individuals off Fung.

Basler and Black began to fight Martin as well. Martin punched Black, but Martin was knocked down. Martin recalled Basler and Black yelling, "Learn to keep your mouth shut" and "Learn to control your bitch." After he fell to the ground, Martin was punched several times. As Black turned to go back to the truck, he gave Martin a kick.

Other people from Martin's group ran towards the fight. Christopher Peters saw Basler standing over Ross, who was on the ground. Peters shoved Basler away from Ross, and Basler swung his knife at Peters. Basler, Fung, and Black ran back to Basler's truck. As they ran back, Grove saw Armstrong limping away. The fight lasted approximately 90 seconds in total.

Grove got into the driver's seat of Basler's truck. Fung sat in the front passenger seat, and Basler and Black were in the back seats. Black was upset and yelled, "What the fuck guys?" Black also complained about pain in his knee. Fung had a large scrape on his head and appeared faint. Fung said, "I think I left my knife there." He was wearing or holding Ross's knit hat (a "beanie"). Grove drove the group to her condominium, though not directly. Basler, Fung, and Black left Grove's apartment together. Later that night, Fung spoke to Rapp by telephone. Fung was playful and flirtatious.

At the scene, Armstrong was wounded and unresponsive. Armstrong was taken to a hospital, where he died. An autopsy revealed numerous knife wounds: two cuts to his right bicep and the back of his left arm, two wounds to his left chest and side (one approximately five inches deep), and one stab wound to his lower back (approximately four inches deep). Armstrong did not have any bruising on his face or knuckles. Armstrong's wounds were consistent with the wounds Fung's knife could have inflicted. Ross suffered four stab wounds to his left abdomen (which punctured his stomach), his left chest, and his left flank (towards his back). He also had several fractured ribs. Ross was taken to a hospital and survived. Martin was not stabbed, but he suffered a concussion as well as scrapes and bruising on his face and hands. A significant amount of blood was on the ground around the scene of the fight.

Police found Fung's knife near Ross's feet. Fung was included as a major donor to DNA found on the knife's handle. Armstrong was a potential major contributor to DNA found with apparent blood on the blade of the knife. Ross was a potential minor contributor to DNA found on a portion of the knife blade.

Police searched Grove's apartment and recovered Ross's beanie and motorcycle gloves that Black wore to the bar on the night of the attack. Several areas on the gloves tested presumptively positive for blood. Forensic examination of DNA recovered from two areas showed that Ross was a potential major donor and Armstrong was a potential minor donor to each.

Black surrendered to police several days after the attack. Fung was arrested in Oceanside, north of San Diego. When questioned by police about the scrape on his head, Fung claimed it was from a skateboarding accident. After the attack, Basler went to a dealership and traded his truck for a different car. When police attempted to arrest Basler, he fled and led police on a high-speed car chase. He surrendered at his attorney's office several days later.

A number of months after their arrest, Basler and Fung were placed in a holding cell together. Their conversation was surreptitiously recorded. During their conversation, Basler and Fung discussed several individuals who may have talked to police. About one woman, Fung said, "I hate that bitch" and "I'm gonna kill her bro." About another man, who was with Fung when he was arrested, Fung said, "I'll fuckin' stab the fuck out of [him]." Basler and Fung talked about how they should have "stab marked" themselves after the fight to claim self-defense. Fung said, "We should have ran" and "We should have went [*sic*] on a straight killing spree." Basler and Fung also laughed about Fung's attempt to kiss Armstrong on the cheek. While in jail awaiting trial, Fung was involved in a fight with a fellow inmate over the inmate's refusal to show Fung the papers showing the charges against the inmate.

At trial, Fung testified in his own defense. Fung denied any plan to attack Armstrong or his friends. Fung claimed that Basler turned his truck into the alley to avoid a police car because he was concerned about being caught driving drunk. Fung said that something hit Basler's truck as they drove through the alley behind the bar. Basler stopped the truck, and they got out. Someone jumped on Fung's back and put Fung in a headlock. Fung was slammed to the ground, choked, and almost lost consciousness. Fung then took out his knife and stabbed the person on his back several times in self-defense. Fung could not identify the person on his back.

DISCUSSION

I

Sufficiency of the Evidence

A

"In reviewing a criminal conviction challenged as lacking evidentiary support, ' "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.] 'The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on " 'isolated bits of evidence.' " ' " (*People v. Medina* (2009) 46 Cal.4th 913, 919 (*Medina*).)

"In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. [Citations.] 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]' [Citation.] ' "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." ' " (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

B

Basler contends the evidence was insufficient to support his conviction for the first degree murder of Armstrong. "A murder that is willful, deliberate, and premeditated is murder in the first degree. (§ 189.) ' "A verdict of deliberate and premeditated murder requires more than a showing of intent to kill. [Citation.] 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." ' " ' " (*People v. Booker* (2011) 51 Cal.4th 141, 172 (*Booker*).)

1

Basler first argues the evidence was insufficient to sustain the element of premeditation and deliberation. " ' "Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] . . . But these categories of evidence, borrowed from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, 'are descriptive, not normative.' [Citation.] They are simply an 'aid for reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citation.]" [Citation.]' [Citation.] These three categories are merely a framework for appellate review; they need not be present in some special combination or afforded special weight, nor are they exhaustive." (*Booker, supra*, 51 Cal.4th at p. 173.) "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (§ 189.)

Here, evidence of planning, motive, and method all support the jury's finding of premeditated and deliberate murder. (See *People v. Proctor* (1992) 4 Cal.4th 499, 529 ["When the record discloses evidence in all three categories, the verdict generally will be sustained."].) Basler proposed to Fung and Black that they pretend to apologize to Armstrong and then "jump" him. Fung and Black agreed. After leaving the bar, Basler turned away from his natural destination (Grove's condominium) and towards the alley where he had last seen Armstrong. Basler was angry and agitated, and his comments

showed his intent to find Armstrong and harm him. Fung apparently agreed, laughing and asking Basler, "Do you see him?" The group stopped at the back of the bar, but did not exit their truck; it can reasonably be inferred they were looking for Armstrong. When the group found Armstrong, Basler and Fung exited Basler's truck immediately with their knives and attacked him. Based on this evidence, the jury could reasonably conclude that Basler and Fung planned to attack Armstrong with their knives and murder him. Basler's focus on the details of the fight, including his contention that it is impossible to determine "exactly" when Armstrong's fatal stab wounds were inflicted, is inapposite. A reasonable jury could find that Basler and Fung planned to kill Armstrong even before the fight began.

Basler and Fung also had a motive to kill Armstrong: Armstrong made comments to Basler and the group that Basler and Fung found disrespectful. Basler was agitated and angry with Armstrong throughout the night, and Basler repeatedly sought to fight Armstrong over perceived slights. Fung agreed with Basler that they should pretend to apologize to Armstrong and then "jump" him. As he looked for Armstrong, Basler told the group, ""Fuck that. Fuck him," and "Fucking kid needs to stop running his mouth." While killing Armstrong was not specifically discussed, the jury could reasonably infer based on the evidence that Armstrong's perceived disrespect was the reason he was killed.

The method of Armstrong's murder also shows premeditation and deliberation. Basler and Fung were the aggressors in Armstrong's attack, and Armstrong was stabbed multiple times and from multiple angles. The lack of any bruising on Armstrong's

knuckles and face show that Basler and Fung's attack did not involve fists. Given this evidence, the jury could reasonably find that Basler and Fung simply ran up to Armstrong and began stabbing him.

The evidence supports the reasonable conclusion that Armstrong's murder was not a rash or unconsidered impulse, but rather the result of premeditation and deliberation. (*Booker, supra,* 51 Cal.4th at p. 173; see *People v. Pride* (1992) 3 Cal.4th 195, 247 ["A violent and bloody death sustained as a result of multiple stab wounds can be consistent with a finding of premeditation."].) The cases cited by Basler, in which different factual scenarios were found sufficient for a jury to find premeditation and deliberation, are inapposite. (See *People v. Pearson* (2013) 56 Cal.4th 393, 439; *People v. Stewart* (2004) 33 Cal.4th 425, 495; *People v. Proctor, supra,* 4 Cal.4th at p. 529; *People v. Raley* (1992) 2 Cal.4th 870, 887; *People v. Pensigner* (1991) 52 Cal.3d 1210, 1237; *People v. Stankewitz* (1990) 51 Cal.3d 72, 114; *People v. Lewis* (1990) 50 Cal.3d 262, 285; *People v. Bloyd* (1987) 43 Cal.3d 333, 340.) They do not imply, much less hold, that the factual scenario here could not also support a finding of premeditation and deliberation.[2]

2

Basler also argues the evidence was insufficient to convict him of the first degree murder of Armstrong as a perpetrator or an aider and abetter under the theory of natural

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2 In light of our conclusion, we need not consider whether the evidence supported the prosecution's alternate theory that Armstrong's murder was first degree murder because it was perpetrated by means of lying in wait under section 189. Even assuming there was no substantial evidence supporting that alternate theory, Basler does not argue he suffered any prejudice from the presentation of this alternate theory to the jury. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130 (*Guiton*).)

and probable consequences. Basler argues that he need not address the theory of direct aiding and abetting because the prosecution did not rely on that theory in closing argument. We disagree. The prosecutor's statement during closing argument disavowing this theory, in the context of his discussion of natural and probable consequences, did not preclude the jury from relying on it. (See *People v. Perez* (1992) 2 Cal.4th 1117, 1126 (*Perez*) ["It is elementary, however, that the prosecutor's argument is not evidence and the theories suggested are not the exclusive theories that may be considered by the jury."]; see also *People v. Clark* (2011) 52 Cal.4th 856, 947.) The general principle cited by Basler, that we "cannot look to legal theories not before the jury in seeking to reconcile a jury verdict with the substantial evidence rule," applies where the jury was not instructed on the legal theory at issue. (See *People v. Kunkin* (1973) 9 Cal.3d 245, 250-251 [declining to rely on theory not included in jury instructions]; see also *People v. Smith* (1984) 155 Cal.App.3d 1103, 1146 (*Smith*) [citing general rule and relying only on theories included in jury instructions].) Basler's failure to address each theory properly submitted to the jury is fatal to his substantial evidence argument. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 358 (*Zamudio*) ["A reversal for insufficient evidence is 'unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict."].) In any event, as we will explain, the evidence supports Basler's conviction of Armstrong's first degree murder at least based on the theory of direct aiding and abetting.

"[A]n aider and abettor is a person who, 'acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing,

encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.' " (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*).) "When the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' " (*Ibid.*)

The evidence supports Basler's conviction as a direct aider and abettor of Armstrong's murder by Fung. At the bar, Basler repeatedly expressed his desire to fight Armtrong, and he told Fung and Black of his plan to pretend to apologize to Armstrong and then "jump" him. Basler attacked Armstrong, dragging him in a headlock outside the bar. When that attack was thwarted, Basler drove his truck to find Armstrong again, telling his group, "Fuck that. Fuck him," and "Fucking kid needs to stop running his mouth." When Basler found Armstrong, he immediately exited the truck with Fung, rushed toward Armstrong, and attacked him. At least one witness saw Basler standing over Armstrong and swinging his fists. From this evidence, along with Basler's knowledge that he and Fung were armed with knives, the jury could reasonably conclude that Basler knew that Fung intended to murder Armstrong; that Basler too intended the premeditated murder of Armstrong; and that Basler's actions (including planning to "jump" Armstrong, attacking Armstrong at the bar, calling for Armstrong to be harmed, driving the truck to the alleyway to find Armstrong, and finally attacking Armstrong a second time) encouraged and aided Fung's murder of Armstrong. Aside from his

contention that the Attorney General may not now rely on this theory, which we have already rejected, Basler offers no substantive argument to the contrary. Substantial evidence supports Basler's conviction for Armstrong's first degree murder.

C

Black contends the evidence does not support his conviction for Armstrong's murder "whether premeditated or not."[3] Black focuses on the natural and probable consequences theory of aiding and abetting as the basis for his conviction. As we have noted, however, the jury was instructed with theories of liability based on direct aiding and abetting as well as direct perpetration. Black's conviction will be sustained if the evidence supports any theory on which the jury was properly instructed. (See *Zamudio, supra,* 43 Cal.4th at p. 357; *Perez, supra,* 2 Cal.4th at p. 1126; *Smith, supra,* 155 Cal.App.3d at p. 1146.) Black offers no authority for his position that our review for sufficiency of the evidence must be limited to the natural and probable consequences theory of aiding and abetting. Moreover, as we will explain, Black's arguments fail on their own terms.

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3 Black's decision to frame his argument in this manner, and to combine his sufficiency of the evidence arguments regarding his separate convictions for this murder and Ross's attempted murder, leads to a lack of clarity in his contentions. Because, as we will explain, our Supreme Court's recent opinion in *Chiu* prevents Black's conviction for *first degree* murder based on the natural and probable consequences doctrine (see part II, *post*), Black appears to argue that the evidence does not support a conviction for *second degree* murder, thus preventing a reduction of Black's first degree murder conviction to second degree murder as occurred in *Chiu*. (See *Chiu, supra,* 59 Cal.4th at p. 168.)

1

Black first argues that Armstrong's murder could not have been a natural and probable consequence of an aggravated assault.[4] " 'A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' [Citation.] Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' " (*Medina, supra,* 46 Cal.4th at p. 920.)

" 'Although variations in phrasing are found in decisions addressing the doctrine—"probable and natural," "natural and reasonable," and "reasonably foreseeable"—the ultimate factual question is one of foreseeability.' [Citation.] Thus, ' "[a] natural and probable consequence is a foreseeable consequence" . . . .' [Citation.] But 'to be reasonably foreseeable "[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough . . . ."

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4 The jury was instructed that the target crimes underlying the murder charge were assault by means of force likely to produce great bodily injury and battery. We must uphold the jury's verdict if the evidence was sufficient to support Black's murder conviction based on either underlying target crime. (See *Zamudio, supra,* 43 Cal.4th at p. 357.)

[Citation.]' [Citation.] A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury."[5] (*Medina, supra*, 46 Cal.4th at p. 920.)

Here, the jury could reasonably find that Armstrong's murder was a natural and probable consequence of the target crime of aggravated assault. The evidence supports the inference that Black knew both Basler and Fung were armed with knives. (See *Medina, supra*, 46 Cal.4th at p. 921 [recognizing that whether " 'the defendant had knowledge of the weapon that was used before or during his involvement in the target crime' " is a relevant factor].) The evidence also supports the inference that Black also knew of and agreed to Basler's plan to pretend to apologize to Armstrong and then "jump" him. (See *ibid.* [recognizing as another factor the fact that "the fight which led to the committed crime was planned"].) After Basler's first attack on Armstrong was thwarted, the jury could find that a reasonable person in Black's position would have known Basler was trying to find Armstrong—and seriously harm him—based on Basler's statements in the truck. Fung appeared to agree and encourage Basler, asking "Do you see him?" several times. When the group found Armstrong, Basler and Fung immediately exited the truck and began attacking Armstrong. Black got out of the truck moments later and joined the fight, running towards Armstrong as well. Given these

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[5] This standard does not appear to differ substantially from the standards discussed in *Roy v. United States* (D.C. App. 1995) 652 A.2d 1098, 1105 (*Roy*), which Black quotes extensively in his briefing. To the extent the standards differ, we find our Supreme Court's articulation more persuasive. And, of course, we are bound to adhere to our Supreme Court's precedent. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity*).)

facts, the jury could find that a reasonable person in Black's position would have known that murder was a reasonably foreseeable consequence of an assault on Armstrong. (See *id.* at p. 920.)

Black focuses on Basler's "frenzied, pathological rampage against Armstrong" prior to the attack, arguing that Black could not have known Basler would murder Armstrong. But Basler's rage, and the knives he and Fung possessed, only underscore that murder was a reasonably foreseeable consequence of assaulting Armstrong. The fact that Black was not possessed of a similar rage and did not act as aggressively as Basler is irrelevant. In assessing the reasonable foreseeability of the murder, the focus is on what a reasonable person in Black's position knew or should have known, not whether Black aided or intended the murder itself. (See *People v. Brigham* (1989) 216 Cal.App.3d 1039, 1051 ["The derivative criminal liability of an aider and abettor for a perpetrator's crime may exist even though that crime was unintended by the aider and abettor. The principal committing the crime and his aider and abettor need not possess the same intent in order to be criminal responsible for the committed crime."].) Black's own actions surrounding the fatal fight do not compel the conclusion that murder was not reasonably foreseeable. (See *ibid.*) Nor is the absence of any evidence regarding Black's gang affiliations (or those of any other participant) dispositive. Though courts have often found gang affiliations relevant in determining whether murder is the natural and probable consequence of an assault (see, e.g., *Medina*, *supra*, 46 Cal.4th at pp. 922-923), Black has provided no authority, and we are aware of none, that evidence of gang affiliation is required before murder could be found to be a natural and probable

consequence of an assault. Certainly assault leading to murder occurs outside of the gang context.

Unlike *United States v. Andrews* (9th Cir. 1996) 75 F.3d 552 (*Andrews*), on which Black relies, Armstrong's murder was not unrelated to his assault. The federal appellate court in *Andrews* analogized its facts to "those of a robber who, as part of an agreed scheme to steal a safe, robs the watchman in the building on his own." (*Id.* at p. 556.) Murdering Armstrong was not a wholly different crime from the agreed-upon assault; it was a reasonably foreseeable consequence of the assault in light of the facts known to Black at the time. A reasonable person would have expected, on the facts here, that Armstrong's assault could reasonably lead to his stabbing and murder.

2

Black also argues that the evidence was insufficient to find that he was a perpetrator or direct aider and abettor in the underlying aggravated assault on Armstrong. We conclude the evidence supports a finding that Black was at least a direct aider and abettor of the aggravated assault on Armstrong. "[W]hen a particular aiding and abetting case triggers application of the 'natural and probable consequences' doctrine, . . . the trier of fact must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime." (*Prettyman, supra,* 14 Cal.4th at p. 262.)

The evidence supports the reasonable inference that Black agreed with Basler and Fung on a plan to pretend to apologize to Armstrong and then "jump" (i.e., assault) him. Basler's first attempt to assault Armstrong at the bar was thwarted. When Basler and Fung were driving and looking for Armstrong after leaving the bar, their intention was apparent: they wanted to assault Armstrong again. When they found Armstrong, Basler and Fung got out of the truck immediately and attacked Armstrong. Black willingly joined the fight moments later. Black punched and kicked Armstrong's friends, who were trying to aid him, and specifically pulled Ross off Fung. Blood with DNA matching Armstrong was found on the knuckles of Black's motorcycle gloves, which gives rise to the reasonable inference that he took part in punching Armstrong as well. All of these actions directly aided Basler and Fung's assault on Armstrong. These actions, as well as the group's initial plan to "jump" Armstrong and Black's statements during the fight, show that Black intended that Armstrong be assaulted as well. The evidence therefore supports each of the elements of direct aiding and abetting. (See *Prettyman, supra,* 14 Cal.4th at p. 262.)

Black relies on an alternative interpretation of the events, in which Black was a reluctant participant in the animosity between the groups and only became involved in the fight behind the bar to stop the fighting and prevent further injury. Our standard of review forecloses such an interpretation. We must view the evidence in the light most favorable to Black's conviction, drawing all reasonable inferences from the evidence to support the jury's verdict. (*Medina, supra,* 46 Cal.4th at p. 919.) " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the

circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Thomas, supra*, 2 Cal.4th at p. 514.) Black's argument also omits or downplays certain crucial facts, including Black's agreement with the plan to "jump" Armstrong and the DNA found on Black's gloves. Black's argument is therefore unpersuasive.

D

Basler and Fung contend the evidence does not support their convictions for Ross's premeditated attempted murder because there was insufficient evidence of premeditation. Evidence of premeditation in the context of attempted murder is evaluated under standards similar to those governing evidence of premeditation in the context of a completed murder. (See *People v. Gonzalez* (2012) 54 Cal.4th 643, 663 (*Gonzalez*).) As in the context of murder, our Supreme Court has "identified three categories of evidence relevant to determining premeditation and deliberation: (1) events before the murder that indicate planning; (2) a motive to kill; and (3) a manner of killing that reflects a preconceived design to kill." (*Ibid.*) These factors "are not all required [citation], nor are they exclusive in describing the evidence that will support a finding of premeditation and deliberation." (*Ibid.*) "It is also not necessary that any of these categories of evidence be accorded a particular weight [citation], and it is not essential that there be evidence of each category to sustain such a conviction." (*People v. Gonzalez* (2012) 210 Cal.App.4th 875, 887.) These factors are intended "to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing [or attempted killing] was the result

of preexisting reflecting and weighing of considerations rather than mere unconsidered or rash impulse." (*Perez, supra,* 2 Cal.4th at p. 1125.)

The evidence shows that Basler and Fung set out to find Armstrong and harm him after Basler's first attack on Armstrong was thwarted. When they attacked Armstrong, Ross came to Armstrong's aid. Basler and Fung therefore had a motive to attack Ross as well: he was protecting Armstrong. During the fight, Ross jumped on one of the defendants (likely Fung) and attempted to subdue him. While Fung may have attempted to stab Ross at that point, Ross's wounds show that he was stabbed at least two more times in locations that appear inconsistent with Fung's contention that he only stabbed Ross while Ross was on Fung's back. The number and location of these wounds, including one in Ross's left flank towards his back, as well as the fact that Ross was not armed, show that the perpetrator did not act rashly and impulsively in response to some threat posed by Ross. Instead, the perpetrator—whether Fung or Basler—acted with deliberation and premeditation in an attempt to kill Ross. This evidence corresponds to the second and third factors outlined by our Supreme Court, and it is sufficient to support the jury's finding of premeditation here. Moreover, while the evidence of planning is weaker, it is not absent. Basler and Fung were planning to murder Armstrong and, given the prior animosity between their group and Armstrong's group, it is reasonable to infer that Basler and Fung planned to murder anyone who attempted to defend Armstrong as well. The number and depth of Ross's wounds, as well as the brevity of the overall fight, support this inference.

Basler and Fung emphasize the rapidity of the fight and the fact that Ross's stabbing took place while the altercation was ongoing. But there is no minimum amount of time in which premeditation and deliberation can occur. " 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' " (*Perez, supra,* 2 Cal.4th at p. 1127.) As we have noted, the brevity of the fight could also give rise to the inference that Basler and Fung planned to kill—and accomplished that goal with rapidity.

While the circumstances of the fight might reasonably lead one to conclude Ross's attempted murder was not premeditated, the jury rejected that conclusion here. As long as the jury's conclusion was reasonable in light of the evidence, we may not disturb it on appeal. "Even if we might have made contrary factual findings or drawn different inferences, we are not permitted to reverse the judgment if the circumstances reasonably justify those found by the jury. It is the jury, not the appellate court, that must be convinced beyond a reasonable doubt. Our task and responsibility is to determine whether that finding is supported by substantial evidence." (*Perez, supra,* 2 Cal.4th at p. 1126.) For the reasons we have discussed, the jury's findings here were supported by substantial evidence.

E

Basler also argues the evidence was insufficient to convict him of the premeditated attempted murder of Ross as a perpetrator or an aider and abetter under the theory of natural and probable consequences. As with his discussion of Armstrong's murder (see part I.B.2., *ante*), Basler does not discuss the theory of direct aiding and abetting. Again, this omission is fatal to Basler's argument. (See *Zamudio, supra,* 43 Cal.4th at p. 358.) Moreover, as we will explain, we conclude the evidence supports Basler's conviction for the attempted premeditated murder of Ross either as a perpetrator or as a direct aider and abettor.

The jury could reasonably infer that Basler stabbed Ross at least once, even though the evidence suggests Fung stabbed Ross as well. One witness, Christopher Peters, saw Basler standing over Ross as he lay on the ground. The number and location of Ross's wounds, as well as the relatively small amount of Ross's DNA found on Fung's knife, supports the conclusion that Basler participated in stabbing Ross. The evidence of premeditation discussed above applies equally here as well. (See part I.D., *ante*.) The jury could reasonably have concluded that Basler perpetrated the premeditated attempted murder against Ross. Even assuming Fung stabbed Ross, the same evidence shows that Basler aided and abetted Fung's premeditated attempted murder of Ross. (*Prettyman, supra,* 14 Cal.4th at p. 259.) Substantial evidence therefore supports Basler's conviction either as a perpetrator or as a direct aider and abettor.

Basler focuses on other evidence, including the fact that no one saw Basler stab anyone and Peters's pretrial statement that Basler pulled a knife out of his pocket *after* the

stabbings occurred. However, the fact that no one saw Basler stab Ross (or anyone else) does not make the inference that he did so, based on other evidence, unreasonable. And Peters clarified his pretrial statements at trial, testifying that he did not see Basler take the knife out of his pocket. Instead, Basler may have already been holding the knife. The undisputed fact that Basler then swung his knife at Peters supports the inference that he swung his knife at others that night as well, including Ross.

F

Black contends the evidence does not support his conviction for Armstrong's attempted murder "whether premeditated or not." Again, Black focuses on the natural and probable consequences theory of aiding and abetting as the basis for his conviction and does not explain why we should ignore the other theories with which the jury was instructed. Black's conviction will be sustained if the evidence supports any theory on which the jury was properly instructed. (See *Zamudio, supra,* 43 Cal.4th at p. 357; *Perez, supra,* 2 Cal.4th at p. 1126; *Smith, supra,* 155 Cal.App.3d at p. 1146.) In any event, as we will explain, Black's arguments fail on their own terms.

Black argues that attempted murder, or potentially premeditated attempted murder, was not a natural and probable consequence of an assault on Ross by means likely to produce great bodily injury. As we will explain more fully in part III, *post*, our Supreme Court has held in this context that *premeditated* attempted murder need not be the natural and probable consequence of a target crime: "Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the

target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*People v. Favor* (2012) 54 Cal.4th 868, 880 (*Favor*).) The issue here is therefore whether the attempted murder of Ross was a natural and probable consequence of aggravated assault, without regard to the foreseeability of premeditation.

As with Armstrong's murder, a reasonable person in Black's position would have known that Ross's attempted murder was a natural and probable consequence of the target crime of aggravated assault on Ross. (See *Medina*, *supra*, 46 Cal.4th at p. 920.) The evidence supports the reasonable inference that Black knew Basler and Fung were armed with knives and harbored an intent to harm Armstrong and his friends. Basler and Fung's anger towards Armstrong and his friends was very high, and their assault on Armstrong and Ross could easily and naturally progress towards murder (as it in fact did).

As we have noted (see fn. 3, *ante*), Black's discussion of the natural and probable consequences doctrine does little to distinguish between the foreseeability of Armstrong's murder and Ross's attempted murder. Black's arguments, to the extent they apply to Ross's attempted murder, are therefore rejected for the same reasons we have already discussed with respect to Armstrong's murder. (See part I.C.1., *ante*.)

In his reply brief, Black claims he had no reason to believe Basler and Fung would use knives during the fight with Armstrong and his friends. But the evidence supports the opposite inference: Basler and Fung wanted to harm Armstrong and his friends, and their knives were readily available tools in that endeavor. It is reasonable to believe Basler

and Fung would use those knives when the fight commenced. Based on Basler and Fung's actions before and during the fight, attempted murder was a reasonably foreseeable consequence of their assault on Ross.

II

Chiu *and Instructions on Natural and Probable Consequences*

Basler, Fung, and Black contend the court erred by instructing the jury that it could rely on the natural and probable consequences theory of aiding and abetting to convict them of Armstrong's first degree murder. After the jury's verdicts in this case, our Supreme Court held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Chiu, supra,* 59 Cal.4th at p. 159.)

The Supreme Court expressed the concern that a conviction for first degree premeditated murder would be disproportionate where a defendant did not share the intent of the perpetrator of the murder and only intended to commit the target crime. (*Chiu, supra,* 59 Cal.4th at p. 166 [" '[T]he connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine . . . .' "].) The Supreme Court explained, "[W]e hold that punishment for *second degree* murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine. We further hold that where the direct

perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine." (*Ibid.*, italics added.)

The Attorney General concedes the trial court erred under *Chiu*. We must therefore determine the prejudice flowing from that error. As *Chiu* explained, "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a valid basis in the record to find that the verdict was based on a valid ground." (*Chiu*, *supra*, 59 Cal.4th at p. 167.) Defendants' first degree murder convictions must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on a legally valid theory, i.e., that the defendants either perpetrated Armstrong's premeditated murder or directly aided and abetted it. (*Ibid.*)

As to Black, the Attorney General further concedes the error was prejudicial. However, the Attorney General argues that the error as to Basler and Fung was harmless: "Based on the evidence in this record, this Court can and should find, beyond a reasonable doubt, that the error was harmless because the jury's verdicts of guilt as to the premeditated murder of Armstrong all rested on a finding that those two appellants [Basler and Fung] were principals in the commission of that offense." The Attorney General also contends that, given the evidence, the jury must have found Fung was the perpetrator of Armstrong's murder and Basler at least a direct aider and abettor.

Our Supreme Court has held that instructional errors of this type may be harmless where "it is possible to determine from other portions of the verdict that the jury necessarily found the defendant guilty on a proper theory." (*Guiton, supra*, 4 Cal.4th at p. 1130.) Here, the jury's verdicts found each defendant guilty of first degree murder, without specifying a theory. The verdicts themselves therefore do not demonstrate harmlessness beyond a reasonable doubt. The Attorney General argues that the verdicts *imply* that the jury must have found one defendant perpetrated the murders. Because this argument should be viewed in the context of the evidence presented at trial, we will consider the Attorney General's argument following our review of harmless error in light of the evidence.

"[A] demonstration of harmless error does not require proof that a particular jury '*actually* rested its verdict on the proper ground [citation], but rather on proof beyond a reasonable doubt that *a rational jury* would have found the defendant guilty absent the error [citation].' " (*Gonzalez, supra,* 54 Cal.4th at p. 666.) If a reviewing court is convinced beyond a reasonable doubt that any rational jury would have found the defendants guilty, the instructional error is harmless. On the other hand, if the reviewing court believes a rational jury could have acquitted the defendants, the error was not harmless. This analysis " ' "will often require that a reviewing court conduct a thorough examination of the record." ' " (*Ibid.*) Our task is "to determine 'whether the record contains evidence that could rationally lead to a contrary finding,' " i.e., a jury finding that the defendants were not either the perpetrators or the direct aiders and abettors of Armstrong's first degree murder. (*Ibid.*) At base, the issue here is *not* whether the

evidence is *sufficient* to sustain the jury's verdict; instead, "our task in analyzing the prejudice from the instructional error is whether any rational fact finder could have come to the *opposite* conclusion." (*People v. Mil* (2012) 53 Cal.4th 400, 418.)

Both legally proper theories of first degree murder share a required mental state. As we have noted, a murder that is "willful, deliberate, and premeditated . . . is murder of the first degree." (§ 189.) The direct perpetrator of a first degree murder must act both with intent to kill and with premeditation and deliberation. (See *Booker, supra,* 51 Cal.4th at p. 172.) A direct aider and abettor must share the perpetrator's intent. "[O]utside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117-1118.) " 'When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.]' [Citation.] What this means here, when the charged offense and the intended offense—murder or attempted murder—are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine, is that the aider and abettor must know and share the murderous intent of the actual perpetrator." (*Ibid.*, fn. omitted.) If a rational jury could find that the prosecution had not proved this mental state beyond a reasonable doubt as to the defendants, the instructional error here was not harmless. (See *Gonzalez, supra,* 54 Cal.4th at p. 666.)

As to Black, as we have noted, the Attorney General concedes the prejudicial effect of the error. We agree. A rational jury could have found that Black intended only to assault Armstrong and did not harbor any murderous intent towards him. A rational jury could have credited evidence showing Black was largely conciliatory towards Armstrong's group, Black was not carrying a knife, and Black was surprised by the stabbings of Armstrong and Ross during the fight (as shown by his statement in Basler's truck: "What the fuck guys?"). A rational jury believing this evidence could have convicted Black of first degree murder under the natural and probable consequences doctrine because Black was a perpetrator or directly aided and abetted the assault on Armstrong, but found Black not guilty of first degree murder as a perpetrator or direct aider and abettor based on his lack of murderous intent. Because a rational jury on this record could have based its verdict on the legally improper theory of natural and probable consequences but rejected the legally proper theories of perpetration and direct aiding and abetting, we cannot tell whether the jury based its verdict on a proper theory. (See *Chiu, supra,* 59 Cal.4th at p. 167; *Gonzalez, supra,* 54 Cal.4th at p. 666.) The instructional error is therefore prejudicial as to Black.

As to Basler, we likewise conclude the error was prejudicial. Like Black, a rational jury on this record could find that Basler intended only to assault Armstrong, not kill him. Although Basler was armed and witnesses saw Basler attacking Armstrong, no one saw Basler wielding a knife at that time. There was no direct evidence that Basler personally stabbed Armstrong. One witness, Christopher Peters, told investigators that Basler pulled a knife out of his pocket after he had attacked Armstrong. While Peters

recalled the episode differently at trial, a rational jury could have credited Peters' initial statement and believed that Basler did not wield a knife when he attacked Armstrong. If Basler was not the perpetrator of Armstrong's murder, he could only have aided and abetted Fung. On this record, however, a rational jury could have determined that Basler did not have the requisite mental state given the lack of evidence regarding when Armstrong was stabbed and the circumstances surrounding the stabbing. Although the evidence supports the rational inference that Basler acted with the required mental state (see part I.B.2., *ante*), the evidence also reasonably supports the opposite inference that Basler intended only to harm Armstrong, not kill him. A rational jury could therefore have rejected the theories of perpetration and direct aiding and abetting and based its verdict solely on the legally improper theory of natural and probable consequences. Because we cannot say that any rational jury would have convicted Basler based on a legally correct theory of first degree murder, the instructional error here was prejudicial. (See *Chiu, supra,* 59 Cal.4th at p. 167; *Gonzalez, supra,* 54 Cal.4th at p. 666.)

As to Fung, the question of prejudice is more complicated. The evidence was undisputed he stabbed at least one of the victims. Fung testified that he was attacked by one of the victims, put into a headlock, and was compelled to stab his attacker in self-defense. Based on the testimony of other witnesses, including Ross, a rational jury could have found that Ross was the person whom Fung stabbed in the incident Fung described in his testimony. Fung's knife, found at the scene, had blood on the blade and on the handle. Armstrong was a major contributor to the mixture of DNA found on two points on the blade and on the handle. Fung was also a contributor to the mixture of DNA

found on the handle. The Attorney General argues that this evidence demonstrates the jury must have found Fung was the perpetrator of Armstrong's first degree murder. But no witnesses saw Fung stab Armstrong, and any evidence of premeditation and deliberation—required elements of first degree murder—is necessarily inferential. Even if the jury believed Fung stabbed Armstrong, a reasonable jury could have found that the prosecution did not prove beyond a reasonable doubt that Fung acted with premeditation and deliberation given the nature and circumstances of the fight and subsequent killing. A rational jury, for example, could have found that Basler was the perpetrator of Armstrong's first degree murder, whereas Fung did not have the required mental state because he stabbed Armstrong in the heat of passion only after being attacked by Ross.[6] A rational jury could therefore have based its verdict solely on the legally improper theory of natural and probable consequences. As with Black and Basler, the erroneous instruction on that theory was prejudicial as to Fung as well. (See *Chiu, supra,* 59 Cal.4th at p. 167; *Gonzalez, supra,* 54 Cal.4th at p. 666.)

As we have noted, the Attorney General points out that the jury's verdicts show it must have believed at least one defendant (likely Basler or Fung) perpetrated first degree murder. To convict any of the defendants of first degree murder under the natural and probable consequences doctrine, the jury must have found that one of the defendants

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6 In the context of Basler's substantial evidence argument regarding Armstrong's murder (see part I.C.2., *ante*), the Attorney General argues that a rational jury could have found that Basler was swinging his knife at Armstrong during the attack and had the requisite mental state for first degree murder. As we have explained, we agree. Based on the evidence, the jury could infer that Basler—not Fung—fatally stabbed Armstrong, thus perpetrating the first degree murder of Armstrong.

perpetrated first degree murder. However, this insight does not cure the prejudicial effect of the erroneous instruction because the record does not reflect which defendant the jury believed was the perpetrator. Because both Fung and Basler were armed and seen attacking Armstrong, some jurors could reasonably have found that Basler was the perpetrator (and convicted Fung and Black based only on the natural and probable consequences doctrine), while others could have reasonably believed Fung was the perpetrator (and convicted Basler and Black based only on the natural and probable consequences doctrine). If the natural and consequences doctrine had not been available, such a jury would not have convicted any of the defendants of first degree murder because at least some of the jurors relied on the natural and probable consequences doctrine to find first degree murder as to each defendant. Because we cannot say beyond a reasonable doubt that a rational jury would have convicted Black, Basler, or Fung of first degree murder without the erroneous instruction on the natural and probable consequences doctrine, the error here was prejudicial.[7]

This instructional error affects only the degree of the murder for which defendants were convicted. (*Chiu, supra,* 59 Cal.4th at p. 168.) The proper remedy as to this error is therefore to "reverse[] the first degree murder conviction[s], allowing the People to

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7 Our conclusion is supported by the prosecutor's focus on the natural and probable consequences doctrine during closing argument. As the Attorney General acknowledges, "the doctrine of natural and probable consequences was the centerpiece of the prosecutor's closing argument . . . ."

accept a reduction of the conviction to second degree murder or to retry the greater offense." (*Ibid.*)

III

Instructions on Premeditated Attempted Murder

Basler, Fung, and Black contend the court erred by failing to instruct the jury that it must find Ross's *premeditated* attempted murder, rather than any attempted murder, was a natural and probable consequence of an aggravated assault or battery on Ross. Citing *Favor, supra,* 54 Cal.4th 868, the Attorney General disagrees that an instruction was required.[8]

Basler, Black, and Fung acknowledge that *Favor* may foreclose their argument in this court. *Favor* held, "Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*Favor, supra,* 54 Cal.4th at p. 880.) Under *Favor,* the trial court's jury instructions were correct.

As an intermediate appellate court, we are bound to follow the precedents of our Supreme Court. (*Auto Equity, supra,* 57 Cal.2d at p. 455.) However, this rule is not

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8 The Attorney General also contends the court's jury instructions did require the jury to find that premeditated attempted murder was a natural and probable consequence of the target crimes. Because we find that the jury was not required to give such an instruction, we need not address this alternative argument.

without exception. As our Supreme Court has stated, "Lower courts may decide questions of first impression, including the effect that subsequent events, such as a United States Supreme Court decision, have on decisions from a higher court, including this one." (*People v. Johnson* (2012) 53 Cal.4th 519, 528.) Basler, Fung, and Black argue that the United States Supreme Court's decision in *Alleyne v. United States* (2013) ___ U.S. ___ [133 S.Ct. 2151] (*Alleyne*), issued after *Favor*, undermines our Supreme Court's holding. For reasons we will explain, we disagree.

Alleyne considered whether the Sixth Amendment right to a jury trial requires a fact that increases the mandatory minimum sentence for a crime to be found by a jury. (*Alleyne, supra*, 133 S.Ct. at p. 2155.) The high court held that it must: "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt. [Citation.] Mandatory minimum sentences increase the penalty for a crime. It follows, then, that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." (*Ibid.*, citing *Apprendi v. New Jersey* (2000) 530 U.S. 466, 483, fn. 10.) Relying on *Alleyne*, Basler, Fung, and Black argue that "premeditation" was a fact that increased their possible sentences for the crime of attempted murder. (See § 664, subd. (a).) They believe *Alleyne* requires such a fact to be found by the jury.

Defendants' reliance on *Alleyne* is misplaced. *Alleyne* holds that any fact that increases punishment for a crime is an element of the crime and must be found by the jury, not a judge. (*Alleyne, supra*, 133 S.Ct. at p. 2155.) The only premeditation required to hold defendants liable for premeditated attempted murder as aiders and abettors under

the natural and probable consequences doctrine is the fact that the attempted murder itself was premeditated. (*Favor, supra,* 54 Cal.4th at p. 880; see *Chiu, supra,* 59 Cal.4th at p. 162 ["The premeditation finding—based on the direct perpetrator's mens rea—is determined after the jury decides that the nontarget offense of attempted murder was foreseeable."].) The jury was required to make such a finding here; *Alleyne* is not implicated.

Under *Favor*, the finding defendants claim is absent here—that *premeditated* attempted murder was natural and probable consequence of the target crimes (rather than any attempted murder)—is not an element of the offense of aiding and abetting premeditated attempted murder. (*Favor, supra,* 54 Cal.4th at p. 880 ["Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense."].) It therefore need not be found at all, whether by judge or jury, in order to convict defendants of premeditated attempted murder and sentence them accordingly. This analysis is not impacted by *Alleyne*.[9]

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9 Black also argues that the Supreme Court's holding in *Chiu*, that an aider and abettor cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine, fatally undermines its prior holding in *Favor*. We disagree. *Chiu* explicitly acknowledged and approved of *Favor*'s holding. (*Chiu, supra,* 59 Cal.4th at pp. 162-163.) We find nothing in *Chiu*, whether in form or substance, that would indicate the Supreme Court's intention to overrule the holding in *Favor.* Any argument based on tensions Black perceives between the Supreme Court's analyses in the two opinions is more properly directed to that court for consideration. We remain bound by *Favor*.

We note, however, that Black misperceives the significance of *Favor* and *Chiu*'s characterization of section 664, subdivision (a), as a "penalty provision" rather than an

The real dispute here is whether the finding urged by defendants—that *premeditated* attempted murder was a natural and probable consequence of the target crimes—is an element of aiding and abetting premeditated attempted murder under the natural and probable consequences doctrine or not. That dispute was squarely before our Supreme Court in *Favor*, and the court held it was not an element. We must adhere to that holding. (*Auto Equity, supra*, 57 Cal.2d at p. 455.)

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element of the crime. (See *Chiu, supra*, 59 Cal.4th at pp. 162-163; *Favor, supra*, 54 Cal.4th at p. 877.) That section provides, in relevant part, as follows: "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows: [¶] (a) If the crime attempted is punishable by imprisonment in the state prison, or by imprisonment pursuant to subdivision (h) of Section 1170, the person guilty of the attempt shall be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole." (§ 664, subd. (a).) Section 664 requires that if the "crime attempted," i.e., the attempted murder itself, "is willful, deliberate, and premeditated," a defendant must be sentenced to life imprisonment with the possibility of parole. This section provides the basis for the essential element of premeditated attempted murder discussed in *Favor*, that the attempted murder itself must have been premeditated. Contrary to Black's contention, *Favor* reaffirms the Supreme Court's prior decision in *People v. Seel* (2004) 34 Cal.4th 535, 541, that this fact must be found by the jury. (See *Favor, supra*, 54 Cal.4th at pp. 879-880.) Nothing in section 664 requires the additional finding urged by Black, that the jury must find that premeditated attempted murder was a natural and probable consequence of a target crime. *Favor* did not rely on its characterization of section 664 as a "penalty provision" to reject this additional finding, as Black claims. Rather, *Favor* reached this result because it determined that section 664 does not require the additional finding at all. (See *Favor, supra*, 54 Cal.4th at p. 879 ["Because section 664[, subdivision] (a) 'requires only that the attempted murder itself was willful, deliberate, and premeditated' [citation], it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.' "].)

IV

CALCRIM No. 400

Black contends the trial court erred by instructing the jury with CALCRIM No. 400. Black claims that CALCRIM No. 400, which provides an explanation of the distinction between a perpetrator and an aider and abettor of a charged crime, is defective because it does not explicitly tell the jury that an aider and abettor may be guilty of a lesser crime than the perpetrator.[10] The Attorney General counters that the court's instructions accurately stated the law.

CALCRIM No. 400, as provided by the trial court, reads as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. [¶] Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

The court also provided CALCRIM No. 401 regarding direct aiding and abetting, which read in part as follows: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator

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10 In the trial court, Black proposed that CALCRIM No. 400 be modified by adding the following sentence to the end of the form instruction: "An aider and abettor may be found guilty of a lesser offense than the perpetrator." The trial court declined to adopt Black's proposed modification.

committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

Regarding aiding and abetting under the natural and probable consequences doctrine, the court provided CALCRIM No. 403, which read in part: "Before you may decide whether the defendant is guilty of the crimes charged in Counts 1, 2 and 3, or any lesser included offenses, you must decide whether he is guilty of Assault with Force Likely to Produce Great Bodily Injury or Battery. [¶] To prove that the defendant is guilty of the crimes charged in Counts 1, 2 and 3, or any lesser included offenses, the People must prove that: [¶] 1. The defendant is guilty of Assault with Force Likely to Produce Great Bodily Injury or Battery; [¶] 2. During the commission of Assault with Force Likely to Produce Great Bodily Injury or Battery, a coparticipant in that Assault with Force Likely to Produce Great Bodily Injury or Battery committed the crimes charged in Counts 1, 2 or 3, or any lesser included offenses; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the crimes charged in Counts 1, 2 or 3, or any lesser included offenses was a natural and probable consequence of the commission of the Assault with Force Likely to Produce Great Bodily Injury or Battery. [¶] . . . [¶] The People are alleging

that defendant originally intended to aid and abet Assault with Force Likely to Produce Great Bodily Injury or Battery. [¶] If you decide that the defendant aided and abetted one of these crimes and that the crimes charged in Counts 1, 2 and 3, or any lesser included offenses was a natural and probable consequence of that crime, the defendant is guilty of the crimes charged in Counts 1, 2 and 3, or any lesser included offenses."

After providing instructions on the elements of first and second degree murder and attempted murder, with and without premeditation, the court used CALCRIM No. 640 to instruct the jury on their deliberations regarding the different degrees of murder. That instruction provided that the jury should consider each degree and return a guilty verdict only if the jury agrees that a defendant is guilty of that degree of murder. The court also instructed the jury in a similar manner using CALCRIM No. 3517 that the jury may find attempted voluntary manslaughter as a lesser included offense of attempted murder under certain circumstances.

As we have noted, Black contends the court's instructions were erroneous because they did not explicitly inform the jury that an aider and abettor can be guilty of a lesser offense than the perpetrator. Black claims this situation may arise if, for example, a direct aider and abettor does not share the full extent of the perpetrator's mental state or an aider and abettor under the doctrine of natural and probable consequences could only reasonably foresee a lesser crime than the perpetrator committed.

Our Supreme Court has held that an aider and abettor may be guilty of a greater offense than the perpetrator: "Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of

the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*McCoy, supra,* 25 Cal.4th at p. 1120.) Courts have extended this reasoning to lesser offenses as well: "Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state." (*People v. Samaneigo* (2009) 172 Cal.App.4th 1148, 1164.)

Given these principles, "[w]e now examine the instructions to determine whether this law was correctly conveyed to the jury. Once we have ascertained the relevant law, we determine the meaning of the instructions in this regard. Here the question is whether there is a 'reasonable likelihood' that the jury understood the charge as defendant asserts. [Citations.] 'In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly.' " (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526; see *People v. Houston* (2012) 54 Cal.4th 1186, 1229 ["When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner."].) When reviewing the instructions, we are mindful that " ' "[j]urors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case." ' " (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

"We independently assess whether instructions correctly state the law." (*People v. Lopez* (2011) 199 Cal.App.4th 1297, 1305.)

We conclude that the trial court's instructions, read as a whole, adequately convey that an aider and abettor may not always be liable for the same crime as the perpetrator. CALCRIM No. 400 provides the general framework for understanding the distinction between perpetrators and aiders and abettors. By instructing the jury that "[a] person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator," CALCRIM No. 400 states that perpetrators and aiders and abettors may both be guilty of a crime, but it does not specify how. The substantive provisions of CALCRIM Nos. 401 and 403 determine the extent to which an aider and abettor may be culpable for a crime perpetrated by another. These instructions require the jury to hold the aider and abettor to a sufficiently culpable mental state before returning a guilty verdict. For example, CALCRIM No. 401 requires that the aider and abettor intend to aid and abet the crime before he may be found guilty. In this instruction, the "crime" is unspecified; it is simply the crime that the jury is considering finding the aider and abettor guilty of. CALCRIM No. 403 requires that a reasonable person in the aider and abettor's position know that the crime was a natural and probable consequence of the target crime. The "crime" in this instruction is described broadly as "the crimes charged in Counts 1, 2 and 3, or any lesser included offenses." The jury therefore has the flexibility to consider lesser crimes if they are warranted by the evidence.

The flexibility accorded to the jury is reinforced by CALCRIM No. 640, regarding the various degrees of murder, and CALCRIM No. 3517, regarding lesser included

offenses. Combined with CALCRIM No. 203, which reminded the jury it must consider the charges and evidence separately for each defendant, these instructions adequately conveyed the fact that an aider and abettor may be convicted of a lesser crime than the perpetrator. We see no reasonable possibility the jury misunderstood these instructions in a manner contrary to law.

Black relies on authorities that rejected a prior version of CALCRIM No. 400, which contained the following instruction: "A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." (See *People v. Loza* (2012) 207 Cal.App.4th 332, 348; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118; *People v. Samaniego, supra,* 172 Cal.App.4th at p. 1165; see also *People v. Nero* (2010) 181 Cal.App.4th 504, 510 [rejecting similar "equally guilty" language in CALJIC No. 3.00].) The instructions provided by the court here do not contain this objectionable language or otherwise imply that an aider and abettor must be guilty of the same crime as the perpetrator. Instead, as we have explained, the instructions here required the jury to assess each defendant's culpability separately, including whether they had the mental state necessary for aiding and abetting under CALCRIM Nos. 401 and 403.

Similarly, Black's reliance on *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*) is unavailing. In *Woods*, the trial court instructed the jury with the "equally guilty" language in CALJIC No. 3.00. (*Id.* at p. 1579.) "During deliberations, the jury sent the trial court the following question: 'Can a defendant be found guilty of aiding and abetting a murder in the second degree if the actual perpetrator of the same murder is

determined to be guilty of murder in the first degree?' After discussing the matter with counsel, the trial court answered, 'No.' " (*Ibid.*) *Woods* concluded that the trial court erred because aiders and abettors may have lesser culpability than perpetrators. (*Id.* at p. 1590.) Here, as we have explained, the trial court did not use the "equally guilty" language. Nor did the trial court instruct the jury that an aider and abettor could not be found guilty of second degree murder when the perpetrator is guilty of first degree murder. The jury did not ask any questions or otherwise indicate it was confused by the court's instructions here.

Nonetheless, *Woods* articulated a principle which may be applied to this case: "Even when lesser offense instructions are not required for the perpetrator because the evidence establishes that, if guilty at all, the perpetrator is guilty of the greater offense, the trial court may have a duty to instruct sua sponte on the necessarily included offenses as to aider and abettor liability. If the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part of the jury instructions on aider and abettor liability." (*Woods, supra,* 8 Cal.App.4th at p. 1593.) Here, however, the jury was instructed on lesser included offenses that might be applicable to aiders and abettors. With one exception, which we discuss in the next part, Black does not contend the trial court erred by not instructing on any lesser included offenses. *Woods* does not support Black's claim that the trial court here erred.

Under the court's instructions, the jury could have convicted Black, as an aider and abettor, of a lesser offense than the perpetrator. The jury simply did not do so. Black has not shown any error.

V

Involuntary Manslaughter as a Lesser Included Offense of Murder

Black contends the court erred by not providing an instruction on involuntary manslaughter as a lesser included offense of murder for Armstrong's killing. The trial court instructed the jury with CALCRIM No. 520 regarding first and second degree murder and CALCRIM Nos. 570 and 571 on voluntary manslaughter. Black's counsel requested an instruction on involuntary manslaughter, but the trial court found it was not supported by the evidence.

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offenses were present [citation], but not when there is no evidence that the offense was less than that charged.' " (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) This duty "prevents the 'strategy, ignorance, or mistakes' of *either* party from presenting that jury with an 'unwarranted all-or-nothing choice,' encourages 'a verdict . . . no harsher *or more lenient*

than the evidence merits' [citation], and thus protects the jury's 'truth-ascertainment function' [citation]. 'These policies reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice.' " (*Id.* at p. 155.)

"We independently review a trial court's failure to instruct on a lesser included offense. [Citation.] The court must, on its own initiative, instruct the jury on lesser included offenses when there is substantial evidence raising a question as to whether all the elements of a charged offense are present [citations], and when there is substantial evidence that defendant committed the lesser included offense, which, if accepted by the trier of fact, would exculpate the defendant from guilt of the greater offense." (*People v. Cook* (2006) 39 Cal.4th 566, 596 (*Cook*).)

Involuntary manslaughter is an unlawful killing of a human being, without malice, "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (§ 192, subd. (b).) "An instruction on involuntary manslaughter is required whenever there is substantial evidence indicating the defendant did not actually form the intent to kill." (*People v. Rogers* (2006) 39 Cal.4th 826, 884 (*Rogers*).) When the doctrine of natural and probable consequences is applicable, such an instruction may be necessary under an additional circumstance: "If the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part

of the jury instructions on aider and abettor liability." (*Woods, supra,* 8 Cal.App.4th at p. 1593.)

Here, even assuming the court erred by not instructing the jury with the lesser included offense of voluntary manslaughter, any error was harmless. As a general matter, our Supreme Court has held that "the failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to the state standards of reversibility." (*Breverman, supra,* 19 Cal.4th at p. 165.) Recent decisions have found that, under certain circumstances, a trial court's failure to instruct on lesser included offenses of murder could violate a defendant's federal constitutional rights, requiring more stringent review for harmlessness under the standard in *Chapman v. California* (1967) 386 U.S. 18. (See *People v. Thomas* (2013) 218 Cal.App.4th 630, 633, 644 (*Thomas*); see also *Cook, supra,* 39 Cal.4th at p. 596.)

We conclude any error here was harmless under either standard. The jury was instructed on first degree murder, second degree murder, and voluntary manslaughter. Second degree murder and voluntary manslaughter require mental states less culpable than first degree murder, yet the jury rejected those offenses in favor of first degree murder convictions. By convicting the defendants of murder, the jury found that Armstrong's murder was committed with malice. Since manslaughter, including voluntary manslaughter, is a killing without malice, the jury resolved an express factual finding requisite to involuntary manslaughter against the defendants. (See *Cook, supra,* 39 Cal.4th at p. 597.) We can therefore determine, beyond a reasonable doubt, that the jury would have rejected involuntary manslaughter had it been instructed on that offense

as well. (See *ibid.*; see also *Rogers*, *supra*, 39 Cal.4th at p. 884.) Black's arguments to the contrary, which focus on the prosecutor's closing arguments and an alleged instructional error we have already rejected (see part IV, *ante*), are unpersuasive in light of the jury's verdict.

VI

Evidence of Basler and Fung's Desire to Kill Black

Black also contends the court erred by excluding evidence of a jailhouse conversation between Basler and Fung. During the conversation, Basler and Fung apparently said they should have killed Black before he had a chance to talk to police. Both the prosecution and Black's counsel sought to question Fung about this conversation. The court found the conversation irrelevant and "exercis[ed] [its] discretion" to exclude it.

"Only relevant evidence is admissible [citations], and all relevant evidence is admissible unless excluded by the federal or California Constitution or by statute." (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) It is well-settled that a plan to murder a prosecution witness is relevant to show a defendant's consciousness of guilt. (*People v. Wilson* (1992) 3 Cal.4th 926, 940 ["Defendant's act of soliciting the murder of a critical prosecution witness was highly probative of defendant's consciousness of guilt, which in turn was probative of his identity as the perpetrator of the charged offenses."];

People v. Edelbacher (1989) 47 Cal.3d 983, 1007 ["Defendant concedes that evidence of the solicitation of murder tended to prove consciousness of guilt as to [the victim's] murder . . . ."].) The conversation, as described in the record, appears to be relevant under this authority. Black was a material witness to the charged crimes, and Basler and Fung apparently expressed their wish that he had been killed prior to talking with police.

Otherwise relevant evidence may be excluded, in the discretion of the trial court, "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "A trial court's exercise of discretion under [Evidence Code] section 352 will be upheld on appeal unless the court abused its discretion, that is, unless it exercised its discretion in an arbitrary, capricious, or patently absurd manner." (*People v. Thomas* (2012) 53 Cal.4th 771, 805.) The Attorney General claims that questions about the conversation "would have uselessly prolonged the proceedings, necessitated a cumbersome mini-trial, and resulted in hopeless juror confusion." We disagree. The subject matter of the conversation was limited, directly bore on the issues at trial (e.g., Fung and Basler's guilt), and was easy for the jury to understand. Given the "highly probative" nature of the evidence (see, e.g., *People v. Wilson*, *supra*, 3 Cal.4th at p. 940), we conclude the trial court abused its discretion by refusing to allow questioning regarding this conversation during Fung's testimony.

We fail to see, however, how Black was prejudiced by this error under any standard of review. The fact that Basler and Fung wanted to kill Black before he talked

to police shows that Basler and Fung thought Black would give the police incriminating evidence. It does not show that Black was any less culpable for the crimes. Black claims the conversation would have undermined the credibility of Fung's testimony at trial. But Fung's testimony at trial was largely exculpatory. Fung claimed to have stabbed one of the victims in self-defense and in the heat of passion. This testimony would have benefitted Black as well had the jury believed it. Black would not have gained any significant advantage at trial by calling Fung's credibility into question. Black also claims the conversation would have undermined the prosecution's theory of the case, which characterized the defendants as acting together as a group on the night of the crimes. But the conversation did not bear on the defendant's actions that night; it showed only that conflict had arisen among the defendants many months later. Basler and Fung's expressed desire to kill Black was not caused by anything that occurred that night; it was caused by Black's perceived willingness to cooperate with police. This does not show Black was any less culpable, only that he was more willing to talk to police.[11] The evidence of the conversation does not have any logical tendency to exculpate Black. Its exclusion is therefore harmless.

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11 Black contends he went to the police because he did not believe he had done anything wrong. Black's motivations do not appear to be part of the record or the proffered evidence regarding the conversation at issue. Any conclusion about Black's motivations in this regard would therefore be speculation, and as such we may not consider them.

VII

Prosecutorial Error and Misconduct

Fung and Black contend the prosecutor committed prejudicial error or misconduct during trial. Fung points to aspects of the prosecutor's cross-examination during his testimony, as well as comments during closing argument. Black also points to comments during the prosecutor's closing argument. "The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " ' [Citations.] 'Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' . . . When a claim of misconduct is based on the prosecutor's comments before the jury, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Friend* (2009) 47 Cal.4th 1, 29 (*Friend*).)

A

Fung appears to identify three categories of objectionable questioning during his cross-examination by the prosecutor. The first category involves apparent sarcasm by the prosecutor. For example, after Fung provided additional details about his fight with another inmate while incarcerated, the prosecutor said, "Okay. You left that part out a couple of minutes ago; right?" Referencing the same fight, the prosecutor made light of Fung's claim of self-defense: "Did you have to defend yourself against him, too?" As

another example, when Fung was discussing the extent of his injuries following the fight, the prosecutor said, "So, that's about how badly you were hurt? It looked like something you get by falling off a skateboard?" The court sustained objections to each of these questions, and a number of others, as argumentative.

The second category identified by Fung involves the prosecutor's use of the word "you" to refer to Fung and his codefendants together. Fung contends these questions were impermissibly argumentative as well. For example, the prosecutor asked why "you" turned into the alleyway behind the bar. The court sustained objections to two such questions on the grounds they were argumentative. The prosecutor also used the word "you" in similar contexts, including in questions about why "you" took a group photo and why "you" drove Basler's truck in a certain way. Defense objections to these questions as argumentative were overruled.

The third category consists of a question that Fung claims denigrated defense counsel. After defense counsel objected to a question involving the broad use of the word "you," the prosecutor said, "Listen, let's get it out of the way now. Matthew Basler is driving, right?" Fung argues the prosecutor's comment and question implied that defense counsel's objection was improper.

As we have noted, Fung contends the first two categories of questions were impermissibly argumentative. "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even want an answer. The question may, indeed, be unanswerable. . . . An argumentative question that essentially talks past the

witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.) The court sustained objections to the first category of questions identified by Fung as argumentative. Even assuming they were argumentative, we believe their content was exceedingly mild. Many of the questions, while phrased sarcastically, were apparently designed to elicit relevant testimony. The second category of questions, however, does not appear argumentative. While the prosecutor's use of the word "you" may have been ambiguous, the questions sought relevant testimony. Fung contends the prosecutor's use of the word "you" amounted to an argument that Fung and his codefendants shared the same actions and mental states. We disagree. The word "you" is commonly used to refer to a group. Fung was free to distinguish between himself and his codefendants in answering any question that he believed used the word "you" improperly. The events about which Fung testified were also well known to the jury; it is appears unlikely from the context that the prosecutor's use of the word "you" would have understood by the jury as argument. We see no error or misconduct in the second category identified by Fung.

As to the third category, Fung contends the prosecutor improperly denigrated defense counsel. "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel. [Citations.] 'An attack on the defendant's attorney can be seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum [citation], it is never excusable.' " (*People v. Hill* (1998) 17 Cal.4th 800, 832 (*Hill*).) In *Hill*, for example, the

prosecutor rejected a defense stipulation that the length of the jury box was 20 feet. (*Id.* at p. 833.) In front of the jury, the prosecutor announced it was "unprofessional" and "contemptuous" to ask the prosecutor to stipulate to that fact. (*Ibid*.) In *Hill*, "[o]ther disturbing incidents include [the prosecutor's] audibly laughing in the middle of [defense counsel's] examination of both victim Ronald Johnson and witness Robbie Ventura, and getting out of her chair during [defense counsel's] examination of witnesses, standing in his line of sight, staring at him and making faces at him." (*Id.* at p. 834.) While the prosecutor's question ("Listen, let's get it out of the way now. Matthew Basler is driving, right?") reflected impatience and frustration, the question neither attacked defense counsel nor cast aspirations on counsel's performance. At most, by phrasing the question somewhat rudely, the prosecutor showed some small disrespect to defense counsel.

Any error in the prosecutor's cross-examination of Fung did not amount to prejudicial misconduct. As to the argumentative questions in the first category, the court sustained defense objections. The jury was instructed to disregard any question to which an objection had been sustained. We do not believe the questions in the second category were error. As to the third category, we believe the disrespect shown by the prosecutor was exceedingly mild and did not render the trial unfair. "From our review of the record, we conclude ' "it is not reasonably probable that the prosecutor's occasional intemperate behavior affected the jury's evaluation of the evidence of the rendering of its verdict." ' " (*Friend, supra,* 47 Cal.4th at p. 31.)

B

Fung and Black identify several aspects of the prosecutor's closing argument that they claim was error or misconduct. They claim two instances in which the prosecutor attacked the integrity of defense counsel (one of which Black claims was error under *Griffin v. California* (1965) 380 U.S. 609, 614), several instances in which the prosecutor improperly appealed to the jury's emotions, and one instance when the prosecutor improperly stated the law. We will assess each in turn.

1

The first claim of misconduct stems from the prosecutor's reference, during closing argument, to Fung as the defendants' "best actor": "So when it talks about credibility calls that you're going to have to make, you're going to have to make a credibility call between James Fung, a five-time convicted felon, who they designed as their best actor [¶] . . . [¶] or Robby Hagar. That's the credibility call you have to make." The court overruled defense counsel's objection based on improper argument.

The phrase "best actor" was invoked during the prosecutor's cross-examination of Fung. During that cross-examination, the prosecutor asked about Fung's jailhouse conversation with Basler.[12] In response to the prosecutor's questions, Fung denied talking with Basler about which of the defendants should testify at trial. The prosecutor asked, "Do you remember talking about which one of you is the best actor?" Fung responded, "No." The prosecutor asked Fung to review the transcript of the jailhouse

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12 We have already discussed another aspect of this conversation, involving Fung and Basler's statements about killing Black, in part VI, *ante*.

conversation and then asked, "Do you remember that part of the conversation now—[¶] . . . [¶]—you and Mr. Basler talking about, 'I know you to be the best actor'?" Fung answered, "No, I don't." Fung later said he was not denying that the conversation occurred; he simply did not remember it. The prosecutor later asked, "And you talked with Mr. Basler about how you're needing to decide what the best defense is and then everyone will go with it; right?" Fung answered, "Yeah."

Fung asserts that the prosecutor's statement was based on facts not in evidence. We agree. Fung did not recall the conversation in which he discussed whether he was the "best actor" with Basler. The record therefore contains no evidence that "they designated [Fung] as their best actor," as the prosecutor asserted. Referring to facts not in evidence is " 'clearly . . . misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross examination.' " (*Hill, supra*, 17 Cal.4th at p. 828.)

While the prosecutor's comment constituted misconduct, we conclude it was harmless under any standard. The fact disclosed by the prosecutor, that Basler and Fung had designated Fung their best actor, was of little consequence to the substance of the allegations against the defendants. It was apparent from the prosecutor's argument that he believed Fung was lying in his testimony, an opinion that the prosecutor may properly communicate to the jury. The prosecutor's error was to rely on facts not in evidence to convey this opinion. While it was error, the substance of the prosecutor's statement could not have improperly swayed the jury. The prosecutor's comment neither rendered the

trial unfair nor raised a reasonable probability that the jury's evaluation of the evidence or rendering of its verdict was affected.

Fung also asserts that the prosecutor's "best actor" comment attacked the integrity of defense counsel by implying that they were complicit in offering perjured testimony. Absent evidence, a prosecutor may not imply that defense counsel coached a witness or suborned perjury. (See *People v. Thomas* (1992) 2 Cal.4th 489, 537.) Here, the prosecutor certainly implied Fung was lying, which was proper. "[I]t is a truism that the prosecutor may try to persuade the jury, on the strength of the evidence, that a witness is unworthy of belief." (*Ibid.*) But the prosecutor did not imply that defense counsel had any part in Fung's testimony. The "they" referenced by the prosecutor was Fung and Basler, not defense counsel. Fung's argument is therefore unpersuasive.

Black claims the prosecutor's statement was *Griffin* error. Under *Griffin* and its progeny, it is federal constitutional error for the prosecutor to comment on a defendant's silence at trial or suggest that the jury may infer guilt from such silence. (*Griffin, supra*, 380 U.S. at p. 615; *People v. Hardy* (1992) 2 Cal.4th 86, 154.) Black argues the prosecutor's comment that "they designed [Fung] as their best actor" improperly drew attention to the fact that only Fung—and not Black—chose to testify at trial. We disagree. The prosecutor was describing the evidence at trial and asking the jury to weigh the credibility of Fung's testimony against the testimony of a prosecution witness. In context, the prosecutor was not highlighting the failure to the other defendants to testify; he was commenting on the state of the existing evidence. This was not error. (See *People v. Szeto* (1981) 29 Cal.3d 20, 34 [*Griffin* rule "does not extend to comments

on the state of the evidence"].) We do not believe there was any reasonable likelihood the jury interpreted the prosecutor's remark as a comment on Black's failure to testify or an implicit invitation to infer guilt from that failure. (See *People v. Roybal* (1998) 19 Cal.4th 481, 514-515.) Moreover, any question in the jury's mind would have been resolved by the court's use of CALCRIM No. 355 in its jury instructions, which includes the admonition that the jury not "consider, for any reason at all, the fact that the defendant did not testify." Jurors are presumed to have followed the court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*).)

Even if the jury had interpreted the prosecutor's statement as an improper comment on Black's failure to testify, we conclude any such error was harmless beyond a reasonable doubt. (See *People v. Vargas* (1973) 9 Cal.3d 470, 478-481.) The comment was mild and brief, it was at most implicit, it arose within a larger point regarding Fung's credibility, and any misinterpretation by the jury was resolved by the court's jury instructions. Any error would have had no significant impact upon the jurors in this case. (See *ibid.*)

2

The second claim of misconduct arises from the prosecutor's comment, following a defense objection, that "[t]hey can't object and make it go away." During closing argument, the prosecutor discussed the DNA evidence found on Black's gloves. The prosecutor said, "He [apparently Black] was stomping and kicking Joel's head and face after Joel was stabbed, punching Chris Martin, both Ryan and Joel's blood on his knives—blood on his knuckles—on the knuckles." Black's counsel objected on the

ground that the prosecutor's argument misstated the testimony; the court overruled the objection. The prosecutor then stated, "The blood was on the knuckles. You see the red arrows pointing to where the blood was found? They can't object and make that go away." Fung's attorney objected based on improper argument, and the court sustained the objection.

Fung contends the prosecutor's comment was misconduct because it "implied defense counsel would conduct their respective defenses in a dishonest way in order to obtain favorable verdicts for their clients." While we do not agree with Fung's characterization, the prosecutor's comment does imply that defense counsel acted improperly by objecting. This was error, and the trial court properly sustained defense counsel's objection.

We conclude the prosecutor's error was not prejudicial. The prosecutor's comment was a mild critique of defense counsel's trial tactics, not a disparagement of counsel's integrity. Moreover, in response to a defense motion for mistrial, which the court denied, the court specifically admonished the jury to ignore the prosecutor's emotional appeals and personal attacks on counsel: "Your decisions must be based on reason and logic. You may not be swayed by any emotional appeals by the prosecutor or any attacks by him against any attorney." We presume the jury followed these instructions. (*Sanchez, supra,* 26 Cal.4th at p. 852.) The prosecutor's comment did not deprive defendants of a fair trial, nor is there any reasonable probability the comment affected the jury's evaluation of the evidence or its verdict.

3

The third claim of misconduct is based on a series of prosecution arguments that asked the jury to place themselves in the position of the victims or otherwise improperly appealed to the emotions of the jury. For example, the prosecutor described Armstrong's potential state of mind as he was being stabbed, that he was "just hoping they would stop, hoping they would find it in them not to do this." Defense counsel objected on the ground of improper argument, which the court sustained. The prosecutor also asked the jury to place itself in the perpetrator's position: "If you today had a knife in your hand and you plunged it into someone's heart—[¶] . . . [¶]—you would know the choice that's being made." The court sustained defense counsel's object on the ground of improper argument and struck references to "you" in the argument. The prosecutor also argued, "But the reality is they are all responsible for their own choices and they need to be made responsible, told, 'You are responsible. We know what you did. You took Ryan's life.' " The court again sustained defense counsel's objection on the ground of improper argument.

"It has long been settled that appeals to the sympathy or the passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362.) Similarly, "an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revd. on other grounds *sub nom. Stansbury v. California* (1994) 511 U.S. 318.) The prosecutor's statements were error, as the trial court correctly found.

We conclude the prosecutor's errors were not prejudicial. The trial court sustained objections as to each improper argument. And, as we have noted, the trial court admonished the jury after the prosecutor's argument with the following special instruction: "Your decisions must be based on reason and logic. You may not be swayed by any emotional appeals by the prosecutor or any attacks by him against any attorney." Viewed in context and in light of the entire record, the prosecutor's comments did not deprive the defendants of a fair trial. Nor did these brief statements have the potential to improperly sway the jury. There is no reasonable probability that Black would have obtained a more favorable result absent the errors. (See *People v. Stansbury, supra,* 4 Cal.4th at p. 1057.)

4

The fourth claim of misconduct alleges that the prosecutor misstated the law of premeditated attempted murder. In closing argument, the prosecutor stated, "If a reasonable person had a knife in their hand—not the defendants—a reasonable person had a knife in their hand before they plunged that knife into somebody's chest, you would know, put that knife in their chest, you could kill them. You'll probably kill them. That's what we're talking about. They knew that. A reasonable person would know that. They chose death. This was willful, deliberate, and premeditated."

" '[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements.' " (*Hill, supra,* 17 Cal.4th at p. 829.) Fung claims the prosecutor misstated the law by (1) implying that a finding of premeditation is

based on a reasonable person standard and (2) suggesting that knowledge of the dangerousness of one's actions is sufficient to show intent to kill. When viewed in context, however, there is no reasonable likelihood the prosecutor's comments led to a misunderstanding of the law. The prosecutor had already explained the elements of premeditation and intent to kill. The court's jury instructions also explored these concepts extensively. While the prosecutor's language may have been loose, the prosecutor was making his argument, not explaining the legal standards he had already gone over. Moreover, to the extent the jury had any confusion, the court's instructions included CALCRIM No. 200, which told the jury: "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." The jury is presumed to have followed the court's instructions. (*Sanchez, supra*, 26 Cal.4th at p. 852.) In light of the entire record, any confusion engendered by the prosecutor's comments was therefore harmless under any standard.

C

Fung also contends that the cumulative effect of the errors is prejudicial. We disagree for the reasons we have discussed with respect to each error. And, given the trial court's active and effective role in guiding the proceedings, we believe the following statement of our Supreme Court applies: "In concluding that any misconduct that occurred was not prejudicial we again note that the trial court was firmly in charge of the proceeding and kept matters under control by sustaining several defense objections. Furthermore we conclude that none of the asserted instances of misconduct was of such

severity, considered alone or together with the other asserted instances of misconduct, that it resulted in an unfair trial in violation of defendant's state and federal constitutional rights." (*Friend*, *supra*, 47 Cal.4th at p. 30.) In light of our conclusion, we need not consider whether any of the foregoing claims of prosecutorial error or misconduct have been forfeited, as the Attorney General asserts.

VIII

Request to Dismiss Strike Prior under Romero

Black contends the court erred by declining to dismiss his prior serious felony conviction under *Romero*, *supra*, 13 Cal.4th 497. " 'In *Romero*, [the Supreme Court] held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own motion, "in furtherance of justice" pursuant to . . . section 1385(a).' " (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*).) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) "Thus, the [T]hree [S]trikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to

explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra,* 33 Cal.4th at p. 378.)

"[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*Carmony, supra,* 33 Cal.4th at p. 375.) " 'This standard is *deferential*. [Citations.] But it is not empty.' " (*People v. Garcia* (1999) 20 Cal.4th 490, 503 (*Garcia*).) "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' [Citation.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Carmony, supra,* 33 Cal.4th at pp. 376-377.)

Black admitted a prior conviction for assault with a deadly weapon under section 245, subdivision (a)(1). Over Black's objection, the court found that Black's conviction was a serious felony under section section 667, subdivision (d), and section 1192.7, subdivision (c). In connection with that crime, Black was convicted of theft or

unauthorized use of vehicle (Veh. Code, § 10851, sub. (a)), and he admitted a gang enhancement under section 186.22, subdivision (b). Black's subsequent history shows that he did not turn away from criminal activity. Instead, he repeatedly ran afoul of the strictures imposed to facilitate his safe return to society. Black violated probation and was sent to prison. He was then paroled, and he violated parole three times. Black was also convicted of providing false information regarding his identity to a police officer. (§ 148.9, subd. (a).) Given this history, and the seriousness of the current offenses, the court was within its discretion to determine that Black was a defendant to whom the Three Strikes law was intended to apply and deny Black's request to dismiss his prior conviction. (*Carmony, supra,* 33 Cal.4th at p. 378; see *People v. Pearson* (2008) 165 Cal.App.4th 740, 749 (*Pearson*).)

Black focuses of the facts of his prior strike, which Black committed when he was 17 years old, and its remoteness in time. Black claims he was involved in a large fight involving a number of high-school-aged boys. Black alleges that he swung a PVC pipe at someone, which caused minimal damage. But the trial court was entitled to reject this interpretation of the crime and credit the seriousness of Black's conviction and his subsequent history, which showed his recidivist tendencies. (See *Pearson, supra,* 165 Cal.App.4th at p. 749.) Black also minimizes his involvement in the current crimes, characterizing his actions as "trying to help codefendant Fung and stop the fighting altogether." But the jury's convictions show they disbelieved that version of events, and the trial court was entitled to disbelieve it as well.

Black points to other factors that he contends warrant relief under *Romero*, including Black's alleged mental health issues, willingness to undergo rehabilitation, and the length of his sentence even if his prior serious felony conviction is dismissed. Black claims the court's comments reflect an emphasis on Black's recidivism and the seriousness of the current crimes. But Black does not show the trial court refused to consider all relevant evidence. "The court is presumed to have considered all of the relevant factors in the absence of an affirmative record to the contrary. [Citation.] Thus, the fact that the court focused its explanatory comments on the violence and potential violence of appellant's crimes does not mean that it only considered that factor." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Black contends the Supreme Court's decision in *Chiu, supra,* 59 Cal.4th 155, which determined the doctrine of natural and probable consequences could not be applied to first degree premeditated murder, shows that his conviction was unjust and his *Romero* request should have been granted. (*Romero, supra,* 13 Cal.4th 497.) We have already explained that the *Chiu* error here was prejudicial. But that instructional error does not affect the reality of the crime Black committed, his criminal history, or his current criminal disposition. Black is entitled to retrial or resentencing on his conviction for Armstrong's first degree murder, but the *Chiu* error does not *ipso facto* make Black any less deserving of a sentence under the Three Strikes law for those convictions that remain. The error under *Chiu* does not demonstrate the court abused its discretion in denying Black's *Romero* request. We note, however, that Black will be entitled to resentencing as a result of the *Chiu* error and any subsequent action regarding the

prosecution's first degree murder charge. Black will be able to renew his *Romero* request at that resentencing.

IX

Cumulative Error

Fung and Black contend that the total effect of the errors alleged deprived them of due process and a fair trial. We disagree. "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' " (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795; see *Hill, supra*, 17 Cal.4th at p. 844.) Most of the errors alleged were not errors, as we have explained. As to those errors we have identified, with the exception of the *Chiu* errors, they were not prejudicial either singly or together for the reasons we have already stated. Fung and Black's contentions to the contrary are unpersuasive.

DISPOSITION

The judgments are reversed in part as to each defendant's conviction for Armstrong's first degree murder. The People may accept a reduction of any or all of the convictions to second degree murder or choose to retry any or all of the defendants on the greater offense. If the People accept a reduction as to a defendant, the trial court shall enter judgment against that defendant for second degree murder and resentence him accordingly. If the People elect to retry a defendant, the trial court shall conduct further proceedings consistent with this opinion. In all other respects, the judgments are affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

Prager, J.*

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* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.